ARAB-MALAYSIAN BANK BHD

v.

MARINA MOHD YUSOFF

HIGH COURT MALAYA, KUALA LUMPUR
STEVE SHIM J
[CIVIL SUIT NO: D5-22-1375-1998]
30 APRIL 1999

CIVIL PROCEDURE: *Time - Computation of - Prescription of when time begins to run included in agreement - "From the date" - Whether inclusive or exclusive of that date - Interpretation Act 1967, s. 54(1)(a) - Rules of the High Court 1980, O. 3 r. 2(2)*

CIVIL PROCEDURE: *Judgment - Default of appearance - Setting aside - Default judgment obtained before time limited for appearance expired - Whether default judgment irregular - Whether defendant prejudiced - Whether irregularity curable under O. 2 r. 1 Rules of the High Court 1980 - Whether default judgment ought to be set aside*

This was the defendant's appeal against the decision of the Senior Assistant Registrar dismissing her application to set aside the default judgment obtained by the plaintiff against her. The main point in contention was when did time begin to run for the defendant to enter appearance to the writ issued against her by the plaintiff. This issue turned on the construction that ought to be given to a particular provision included in a facility agreement entered into between the parties. That provision stated that "... notice shall be deemed to have been duly served after the expiration of two (2) days from the date it is posted ..." The defendant argued that the date of posting ought to be excluded for purposes of calculating when time begins to run and thus the default judgment was obtained prematurely. The plaintiff, on the other hand, contended that the two days included the date of posting and, alternatively, even if it did not, it was a mere irregularity curable under O. 2 r. 1 of the Rules of the High Court 1980 ('the RHC').

Held:

[1] Both s. 54(1)(a) of the Interpretation Act 1967 and O. 3 r. 2(2) of the RHC, provide that the day on which an event happens or an act or thing is done is to be excluded for the purposes of computing time. Although s. 54(1)(a) of the Interpretation Act 1967 relates to computing time specifically for the purpose of a written law while O. 3 r. 2(2)

of the RHC is pertinent only to the Rules of the High Court, they nevertheless provide a useful and necessary guideline in determining the proper construction of the provision in question. Therefore, the date of posting the writ in the instant case is to be excluded when computing the time limited to the defendant to enter an appearance to the writ issued against her. It follows that the judgment in default had not complied with O. 12 r. 4(a) of the RHC and thus was an irregular judgment.

[2] It cannot be disputed that the defendant had been prejudiced as a result of the plaintiff's failure to comply with O. 12 r. 4(a) of the RHC. The procedural irregularity was therefore beyond curability and hence the court ought not to exercise its discretion under O. 2 r. 1 of the RHC.

[Appeal allowed with costs.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1988] 1 MLJ 33 ***(dist)***

Ban Huat Seng Co Ltd v. Lee Poh Soo [1967] 1 MLJ 145 ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(foll)***

Ming Teik Co Pte Ltd v. Kian Cheng (Boxes) MFG Co Pte Ltd [1982] 1 MLJ 305 ***(foll)***

South Staffordshire Tramways Co v. Sickness & Accident Assurance Assn [1891] 1 QB 402 ***(refd)***

Legislation referred to:

Interpretation Acts 1967, s. 54(1)(a)

Rules of the High Court 1980, O. 2 r. 1(1), O. 3 r. 2(2), O. 12 r. 4(a), O. 18 r. 2(1)

Other source(s) referred to:

Words & Phrases – Legally Defined, John B Saunders, vol 2

For the plaintiff - Tan Han Seng; M/s Mah-Kamariyah & Partners

For the defendant - Cik Nurul; M/s Adam & Co

Reported by S Dharmendran

JUDGMENT

Steve Shim J:

This is an appeal by the defendant against the decision of the learned Senior Assistant Registrar dismissing with cost her application to set aside the default judgment obtained by the plaintiff against the defendant.

In this case, the plaintiff had, on 7 May 1998, filed a writ of summons against the defendant claiming a sum of RM1,978,490.44 with interests and costs for alleged breaches of a facility agreement. It is not disputed that the writ together with the statement of claim was served on the defendant by AR Registered Post on 25 May 1998. As the defendant did not enter any appearance, the plaintiff filed a Certificate of Non-Appearance dated 4 June 1998 supported by an affidavit of service with the court registry. On the same date, the plaintiff obtained a judgment in default of appearance before the Senior Assistant Registrar. Thereafter, the defendant, by a summons in chambers dated 14 September 1998, applied to set aside the said judgment in default as per encl. 7 herein. As I have said, this application was heard by the learned Senior Assistant Registrar who dismissed it with cost. Hence, this appeal.

The main thrust of the defendant's application in encl. 7 is that the default judgment was obtained prematurely having regard to the provisions of O. 12 r. 4(a) Rules of the High Court and s. 11.01 of the Facility Agreement entered into between the plaintiff and defendant on 27 May 1996. Now, r. 4(a) of O. 12, relates to *inter alia* the time limited for appearing in the case of a writ served within the local jurisdiction of each High Court in Malaya to eight days after service of the writ inclusive of the day of service. Section 11.01 states as follows:

> 11.01 **Notices**
>
> (a) The service of any Legal Process and/or notices to be given hereunder may be given by prepared registered post or by personal delivery sent to the address specified below (hereinafter referred to as 'Address for Service') of the parties hereto and such Legal Process and/or notice shall be **deemed to have been duly served after the expiration of two (2) days from the date it is posted** and if delivered by hand on the day it was delivered.

The point of contention relates to the question of when time began to run for the defendant to enter an appearance to the writ issued against her by the plaintiff in this case. This centres very much on the construction to be placed on s. 11.01 of the Facility Agreement, in particular, the words underscored above. For the defendant, it has been contended that as the writ together with the statement of claim was posted on 25 May 1998 and deemed to have been served after the expiration of two days from date thereof, time would therefore begin to run on 28 May 1998. According to counsel for the defendant, in computing the two days stated therein, the date of posting *ie*, 25 May 1998 is to be excluded. Here, she relies on s. 54(1)(a) of the Interpretation Act 1967.

In rejecting the construction adopted by the defendant, counsel for the plaintiff has however submitted, in effect, that the key word in the part underscored in s. 11.01 is the word "from" and in this respect, he draws attention to the definition of that word in *"Words & Phrases – Legally Defined"* (Vol. 2) by John B Saunders which states:

> 'From' (a particular date) ... in the strict propriety of language means either inclusive or exclusive (of that date) ... courts of justice are to construe the words of parties so as to effectuate their deeds and not to destroy them ... Supposing that the word *prima facie* has an exclusive meaning, there is no rule that prevents us from interpreting it so as to be inclusive if the use of the word in the transaction leads us to do so ... *Wilkinson v. Guston* [1846] 9 QB 137 per Williams J at p. 146.

From the above, it seems clear that the word "from" can be either exclusive or inclusive in nature depending on the particular circumstances and facts. However, there appeared to be a number of instances in which the English cases had in fact leaned in favour of the exclusive nature of that word. One clear example is the case of *South Staffordshire Tramways Co v. Sickness & Accident Assurance Assn* [1891] 1 QB 402 wherein Day, J said *inter alia*:

> The first question raised is whether or not November 24, 1888, the day on which this event occurred is included in the period covered by the policy. The insurance being for twelve calender months from November 24, 1887, obviously either November 24, 1887 or November 24, 1888 must be excluded, for otherwise the period covered would exceed twelve calender months by one day. I decide ... that the former date is excluded and the latter included ... I cannot but think that, as regards time, 'from' is akin to 'after' and excludes the date fixed for commencement of the computation.

Be that as it may, counsel has cited in support the case of *Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33 where it was argued that the judgment in default had been entered one day short of the period as provided in O. 18 r. 2(1) RHC. It was also submitted that the eight days required for entering appearance did not include the day of service. There, Zakaria Yatim J (as he then was) held that the eight days included the day of service because the words in brackets "including the day of service" in O. 12 r. 4(a) were expressly mentioned therein. In the present case, the situation is quite different. There are no such express words or conditions provided in s. 11.01 of the Facility Agreement. In the circumstances, I do not think *Asia Commercial Finance* has much relevance here.

In my view, the case of *Ming Teik Co Pte Ltd v. Kian Cheng (Boxes) MFG Co Pte Ltd* [1982] 1 MLJ 305 is more in point. There, the court was called upon to construe a provision of the Sale & Purchase Agreement concerning service of a notice. The material part of the judgment stated this:

> The point is this: the party who had to give notice there posted the letter on June 23 and dated the letter June 23 requiring the act to be done and these are the material words, in that notice 'within 21 days from date hereof' i.e. they are giving '21 days from date hereof'. In all these cases whether it is 'from date hereof' or 'from date of receipt hereof' that day is excluded. So when you use the expression 'within 21 days from date hereof', in this case the June 23, so excluding the date 23rd you start counting from June 24, 21 days, that is the period of the notice. So the period commences from June 24 and you count 21 days. That is the period that is given. That is, a fixed certain period, that is the period of the notice. But the notice was posted and because it was posted when it was received, giving the best interpretation possible assume on the next day the letter was received i.e. the 24th. So for the person who receives that notice on June 24, for the purposes of computing the period of notice he has had, you have to exclude June 24 and start counting the period of 21 days commencing from June 25.

I think the above case provides a strong example of how s. 11.01 of the Facility Agreement has to be construed in the instant case and that is that in computing the two days provided therein, the date of posting should be excluded. This proposition finds further support in s. 54(1)(a) of the Interpretation Act 1967 as well as O. 3 r. 2(2) Rules of the High Court, s. 54(1)(a) stipulates:

> In computing time for the purposes of any written law –
>
> (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

And O. 3 r. 2(2) stipulates:

> 2. **Reckoning periods of time**
>
> (2) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

Now, it may be argued, as counsel for the plaintiff has done, that s. 54(1)(a) relates to computing time specifically for the purpose of a written law and that O. 3 r. 2(2) is pertinent only to the Rules of the High Court whereas we are concerned with a Facility Agreement, I am of the view that they nevertheless provide a useful and necessary guideline in determining the proper construction of s. 11.01 in question.

Given the nature of the Facility Agreement and having regard to the purpose for which the computation under s. 11.01 was to be made, I hold the view that in computing the "two (2) days from the date it is posted", the date of posting is to be excluded. That being the position, I agree with the stand taken by the defendant that as the writ together with the statement of claim was posted to the defendant on 25 May 1998, the two days of expiration stated therein would be 26 May 1998 and 27 May 1998 and therefore time began to run as from 28 May 1998 for the defendant to enter an appearance to the writ issued against her. As the judgment in default was obtained on 4 June 1998, it had not complied with O. 12 r. 4(a) RHC. As such it was an irregular judgment.

This brings me to the alternative plea raised by counsel for the plaintiff, namely, that if there was non-compliance with O. 12 r. 4(a) RHC, it was merely an irregularity curable under O. 2 r. 1 RHC. In this connection, he submits that the defendant had failed to show merits on affidavit citing in support the case of *Ban Huat Seng Co Ltd v. Lee Poh Soo* [1967] 1 MLJ 145, in particular that passage of the judgment of Ismail Khan, J (as he then was) which states:

> It was decided in *Evans v. Bartlam*, that in an application to set aside a judgment obtained regularly there must be an affidavit of merits. In the present case, if the subject matter of the suit were gambling transactions then that would be a *prima facie* defence. The power to set aside a regular judgment however is discretionary and in exercising its discretion the court may, apart from the question of merits, consider the conduct of a question, *viz*, whether he has been guilty of laches in making the application and his explanation, if any, as to why he neglected to appear after having been served and why he allowed the judgment to be regularly obtained.

It is immediately noticeable that the observation above relates more to a situation where the court is exercising its discretionary power to set aside a regular judgment as opposed to an irregular judgment. I think the legal position is clearly stated by the Federal Court in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565 wherein Mohd Azmi, FCJ said *inter alia*:

> The principle for setting aside a default judgment under O. 13 r. 8 has been well established and needs no detailed repetition. What is important to observe is that a default judgment is not a judgment on the merits. Accordingly, when such judgment is obtained irregularly, such irregularity would be a sufficient ground by itself for setting it aside. But where the judgment has been obtained regularly, in order to succeed, the defendant must file an affidavit of merits, i.e. the defendant must disclose by affidavit evidence that *prima facie* he has a defence on the merits. Put in another way, the affidavit must disclose that he has an arguable or triable issue on the merits (see *Evans v. Bartlam* [1937] AC 473).

His Lordship went on to state how the discretionary power under O. 2 r. 1 RHC should be exercised. He emphasised the fact that the discretion available to the court to cure irregularities under O. 2 r. 1(1) RHC should only be undertaken in the absence of prejudice. He then concluded as follows:

> Applying the above principle to the facts of these appeals, it is clear that the default judgment (the subject matter of the first appeal) is irregular for non-compliance with the RHC, in particular O. 13 r. 6(1), by failing to serve a statement of claim on the defendants. On this ground alone, the learned Judge was correct in setting aside the entire default judgment. There can be no dispute that the procedural irregularity in the failure to serve the statement of claim on the defendants before the default judgment was entered ... had prejudiced the defendants and therefore beyond curability.

In the light of the principles set out by the Federal Court in *Lai Yoke Ngan,* what is the position in the present case? I have held that the default judgment was irregular for non-compliance with O. 12 r. 4(a) RHC. As such, I do not think it can be disputed that the defendant had been prejudiced as a result. In the premises, the procedural irregularity was therefore beyond curability. I would, in the circumstances, decline to exercise my discretion under O. 2 r. 1 RHC.

For the reasons stated, I find sufficient merit in the defendant's application at encl. 7. I am unable to agree with the decision of the learned Senior Assistant Registrar. I will therefore reverse his decision and allow the defendant's appeal with cost to be taxed unless otherwise agreed.